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Nos. 94 and 96

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL., PETITIONERS

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 94

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.

No. 96

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL., PETITIONERS

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 21–27) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). The petition for a writ of certiorari in No. 94 was filed on April 30, 1946, and the cross-petition for a writ of certiorari in No. 96 was filed on May 1, 1946. Certiorari was granted in both cases on October 14, 1946 (R. 28). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

1. Whether the Court of Claims, in holding in favor of the claimants in one of three related suits brought to determine the ownership of a customs duty overpayment fund, can include in its judgment against the United States interest on the fund for a period prior to the entry of judgment, notwithstanding the provisions of Section 177 (a) of the Judicial Code.

2. Whether the Act of March 3, 1875, *infra*, which provides that interest may be recovered from the United States where the Comptroller General suspends payment of a judgment in order to litigate an asserted counterclaim on behalf of the United States and is unsuccessful therein, has any applicability to the instant case.

STATUTES AND REGULATIONS INVOLVED

The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

The Act of March 3, 1875, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, Title II, Section 13, 47 Stat. 1516, 31 U. S. C. 227, provides:

> When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of

the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.

The pertinent provisions of the Customs Regulations are set out in Appendix B, *infra*, pp. 49–52.

STATEMENT

The instant proceeding (Docket No. 45861 in the Court of Claims) was one of three related suits filed in the court below for the purpose of ascertaining the party or parties entitled to a fund which had been set up as an outstanding liability in the Treasury by direction of the General Accounting Office. The respondents in No. 94 in this Court are N. Y. Rayon Importing Co.,

Inc. (#2)[1] and its "liquidating directors and trustees."[2] In No. 45862, the plaintiffs were N. Y. Rayon Importing Co., Inc. (#1)[3] and its "liquidating directors and trustees." In No. 45863, the plaintiff was Nyrayco Importing & Converting Corporation.[4] The circumstances which raised the question of ownership of the customs duty overpayments and led to the establishment of the fund in the Treasury are as follows:

Rayon #1 was incorporated under New York law on April 26, 1923 (R. 9). Its original name was "N. Y. Artificial Silk Importing Co., Inc." which name was changed to N. Y. Rayon Importing Co., Inc., by certificate filed on May 4, 1925 (R. 9). Nyrayco was incorporated under New York law on January 30, 1928 (R. 9). Both corporations were engaged in the importation of rayon yarn and, between 1925 and 1929, had paid customs duties on such importations (R. 10). Both corporations claimed that the duties assessed were erroneous and, prior to March 1, 1930, had filed protests with the Collector of Customs in accordance with applicable Tariff Act provisions,

[1] Hereinafter called Rayon #2.

[2] Rayon #2 and its liquidating directors and trustees are the petitioners in No. 96 but will hereinafter be referred to as the respondents.

[3] Hereinafter called Rayon #1.

[4] In all three cases, the Societé Pour Nouveaux Placements de Capitaux was impleaded as plaintiff. The court below dismissed "all claims of interest" of this company (R. 27).

which resulted in the institution of actions in the United States Customs Court (R. 10).

Rayon #2 was incorporated under New York law on March 1, 1930, for the purpose of acquiring all the assets and assuming all the liabilities of Rayon #1, Nyrayco, and two other corporations in the rayon business, Rayseta Yarns Corp. and Rayonese Yarns Corp. (R. 9–10). On that day, meetings of the boards of directors of these various corporations were held to formalize this reorganization (R. 10). Pursuant to a resolution of its board of directors, Rayon #2 offered to acquire from Rayon #1, Nyrayco, Rayseta, and Rayonese the assets of those corporations and to assume their liabilities in consideration of the issuance by Rayon #2 to those corporations, or their nominees, of capital stock of Rayon #2 (R. 10). By resolutions of the respective boards of directors, this offer was accepted by Rayon #1, Nyrayco, Rayseta, and Rayonese, and all assets of the latter four corporations were transferred to Rayon #2 (R. 10).[5] Between March and June 1930, all is-

[5] The details of these corporate activities on March 1, 1930, are set out in the findings of the court below (R. 10–15). The findings as to the offer by Rayon #2 on March 1, 1930, and its acceptance by the four other corporations on that date (R. 10–12) are duplicated by findings of offers, apparently cross-offers, made by Rayon #1 and Nyrayco to Rayon #2 on March 4, 1930, four days later (R. 13–14). The court below referred to these offers of March 4 as offers which had been accepted by Rayon #2 at a meeting of its board of directors on March 1, 1930 (R. 12–13). The offers made by Rayon #1

sued and outstanding shares of stocks in Rayon #1, Nyraco, Rayseta, and Rayonese were delivered to Rayon #2, which took over the business and all assets of the four transferring corporations and, in turn, issued to their nominee 1,800 shares of capital stock (R. 14).[5]

On February 27, 1930, a few days prior to the reorganization date mentioned above, Rayon #1 filed a verified application for dissolution with the New York State Department of Taxation and Finance (R. 14–15). The application stated that March 1, 1930, was the date of discontinuance of business, that all of the assets of Rayon #1 had been disposed of, and that Rayon #2 acquired the assets of Rayon #1 and would continue the business formerly conducted by Rayon #1 (R. 15).

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and Nyrayco on March 4, 1930, each refer to an attached schedule of corporate assets and liabilities; no such schedules were ever submitted with or attached to the offers (R. 14). Written consents of the stockholders of record of Rayon #1 and Nyrayco to the transfer of all assets of these corporations to Rayon #2 were not signed until some years after the reorganization, by which time at least two of the corporations (Rayon #1 and Rayon #2) had been voluntarily dissolved (R. 14).

[5] Prior to the reorganization discussed above, a French corporation known as Comptoir des Textiles Artificiel was equitable owner of all outstanding shares of stock of Rayon #1, Nyrayco, Rayseta, and Rayonese (R. 15). Rayon #2 became the legal owner and holder of such shares of stock pursuant to the reorganization and, in turn, issued all of its capital stock to the Societé Pour Nouveaux Placements de Capitaux, a Swiss corporation controlled by the above-mentioned French corporation (R. 15).

On March 1, 1930, a Certificate of Dissolution was issued by the New York Secretary of State (R. 15).

Rayon #2 was voluntarily dissolved on January 9, 1931, by the filing of an application in compliance with the New York law, and the issuance of a Certificate of Dissolution by the New York Secretary of State (R. 15–16). Nyrayco was dissolved on December 16, 1935, by proclamation, under Section 203–a of the New York Tax Law, for nonpayment of franchise taxes (R. 16).

Some time after the above-described reorganization and the dissolution of all three corporations, the United States Customs Court rendered decisions sustaining the protests which had been filed by Rayon #1 and Nyrayco in connection with the assessment of duties on rayon yarn imported between 1925 and 1929 (R. 16). The decisions were rendered on April 30, 1937, and May 6, 1937, and a reliquidation of the customs entries was directed (R. 16). On reliquidation, the Collector of Customs ascertained that a refund of $362,482.71 was payable to Rayon #1 and $30,809.75 to Nyrayco (R. 16). After due certification for payment by the Collector of Customs, checks were drawn by the Chief Disbursing Officer of the United States, payable respectively to Rayon #1 and Nyrayco (R. 16).[1] These checks were not;

[1] One check, in the amount of $2,933.75, was drawn to the Richard Shipping Corporation, the customs house broker of Rayon #1 (R. 16).

however, handed over to Rayon #1 and Nyrayco by the Collector of Customs in view of the fact that both corporations had been dissolved (R. 17). Instead, the Collector of Customs caused the checks to be transmitted to the General Accounting Office "for lawful disposition" (R. 17).[8]

Rayon #2 thereafter requested the General Accounting Office to deliver the above-described checks to it (R. 17). This request was denied, and the Comptroller General deposited the proceeds of the checks in the Treasury in a trust fund entitled "Outstanding Liabilities 1938," pursuant to Section 21 of the Act of June 26, 1934, c. 756, 48 Stat. 1235, 31 U. S. C. 725t.[9]

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[8] The court below found that the fact of the dissolution of Nyrayco for nonpayment of its franchise taxes was never brought to the attention of the United States Customs Court in connection with the proceedings therein (R. 16). No finding was made with regard to knowledge of the voluntary dissolution of Rayon #1. However, it is obvious that, after the checks were issued and delivered to the Collector of Customs, he had become aware of the dissolution of both corporations (R. 17).

[9] In its opinion, the court below states that the General Accounting Office refused payment of the refund checks, after certification by the Collector of Customs of the amount due and the drawing of the checks by the appropriate disbursing officer (R. 21, 22). As shown above, the Collector of Customs was the prime mover in stopping the delivery of the refund checks after they had been drawn. Thereafter, he forwarded the checks to the General Accounting Office "for lawful disposition" with full notice of the difficulties as to payment which had arisen by reason of the corporate reorganizations and dissolutions set out above. The establishment of the Treasury trust fund mentioned above took place thereafter.

Certain efforts were made by Rayon #1, Rayon #2, and Nyrayco, and their representatives, to obtain the Treasury fund. First, a consent decree was entered in a declaratory judgment proceeding in the Supreme Court of the State of New York adjudicating that, as between the three corporations, Rayon #2 was the owner of the customs duty refunds (R. 17). This consent judgment was entered on January 24, 1942, and was forwarded to the General Accounting Office on January 30, 1942, together with a written demand by Rayon #2 for payment to it of the proceeds of the checks (R. 17). The General Accounting Office did not accede to this demand (R. 17). Subsequently, on February 26, 1943, the attorneys for the three dissolved corporations suggested to the Comptroller General that the fund be released to Rayon #1 and Nyrayco with the consent of Rayon #2, each corporation being represented by its director or directors as trustees in liquidation (R. 17–18). The Comptroller General rejected this scheme and stated that payment would be permitted only upon final judgment by a court of competent jurisdiction concluding the issue of ownership (R. 18). He suggested that a suit be brought for this purpose in the Court of Claims (R. 18).

As mentioned above, the offer made by the attorneys for the three dissolved corporations on February 26, 1943, referred to directors of such

corporations as trustees in liquidation. Of the three directors of Rayon #1 at the time of its dissolution, two (Max Spinnler and Austin E. Killkenny) had died by April 1, 1935 (R. 18). On and after that date and at the time of the rendition of the Customs Court's decisions, Charles A. Springstead was the sole surviving director (R. 18). The court below found that, on April 20, 1938, Springstead held a directors' meeting and elected Alfred L. Rose as a director, and Rose and Springstead thereupon elected Norman S. Goetz (R. 18).[10] Of the three directors of Nyrayco at the time of its dissolution, one (Max Spinnler) had died on April 1, 1935 (R. 19); a second (Martin Lowenberg) had resigned on January 22, 1942 and, on and after that date, Samuel W. Lowenberg was the sole surviving director (R. 19). The court below found that, at a meeting of the board of directors of Nyrayco on January 22, 1942, Samuel W. Lowenberg elected Alfred L. Rose as director, and Lowenberg and Rose elected Norman S. Goetz (R. 19).[11]

[10] Springstead, Rose, and Goetz appeared in the court below as representative plaintiffs in Docket No. 45862 (R. 19).

[11] None of these directors appeared as representative plaintiffs in the court below in Docket No. 45863, the suit brought by Nyrayco. Both Martin Lowenberg and Samuel W. Lowenberg, the latter individually and as attorney in fact for relatives of the deceased Max Spinnler, were ordered to appear before the court below to assert any interest which they might have in the suits (R. 20). No appearance was entered by either (R. 21).

At the time of the dissolution of Rayon #2, its directors were Rose, Spinnler and one Hartley Robbins; one vacant directorship existed (R. 19). As noted above, Spinnler died in April, 1935. Robbins died on May 25, 1938 (R. 19). The court below found that, at a meeting of the board of directors of Rayon #2 on June 10, 1938, Rose elected Norman S. Goetz as director, Goetz and Rose elected Walter Mendelsohn, who joined with them to elect Bernard D. Lang (R. 19–20).[12]

Following the suggestion of the Comptroller General that suit be brought in the Court of Claims to determine the question of ownership of the customs duty overpayment fund, the three proceedings mentioned above (*supra*, pp. 4–5) were instituted by complaints filed on April 29, 1943 (R. 20). Amended complaints were filed on January 21, 1944 (R. 20).

On February 4, 1946, the Court of Claims concluded that the respondents herein, Rayon #2, and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn, and Bernard D. Lang, as its liquidating directors and trustees, were entitled to the customs duty fund (R. 21, 27). The court further ordered that the petitions filed by Rayon #1 and its liquidating directors, and by Nyrayco, be dismissed (R. 21). As part of its decision in

[12] Rose, Goetz, Mendelsohn, and Lang appeared in the court below as representative plaintiffs in the instant case (R. 20).

favor of respondents herein, the court below awarded 6% interest on the total fund, such interest to run from April 19, 1941 (R. 21).

In No. 94, the Government petitioned for a writ of certiorari to obtain review of the action of the court below in awarding interest. In No. 96, the respondents filed a cross-petition urging that interest should have been allowed for a period beginning at the time of the issuance of the refund checks, rather than the later date used by the court below.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest upon the instant claim against the United States prior to the time of the rendition of its judgment.

2. In holding itself generally empowered to award interest against the United States whenever, in its opinion, officials of the Government have withheld payment of claims against the Government for more than a reasonable length of time.

3. In failing to hold that interest may not be awarded against the United States in the absence of a specific statutory authorization for such an award.

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4. In awarding interest against the United States on judgments of the United States Customs Court despite provisions of the Customs Regulations which expressly prohibit interest on such decisions.

5. In including in its judgment interest on the claim here involved for a period prior to the rendition of such judgment.

SUMMARY OF ARGUMENT

I

This was one of three related proceedings brought in the court below to determine the ownership of a customs duty refund held in the Treasury as an outstanding liability. The Government's disbursing officers withheld payment, not because of any general denial of the Government's liability for the fund but because they were unwilling to assume the essentially judicial function of solving the complex question, arising out of activities of respondents and others, of ownership of the fund. The Government's disbursing officers did not deem an administrative decision as to the validity of assignments, the capacity of dissolved corporations to sue under state law, and the legal standing of various claimants to receive the fund, in any way adequate to protect the Government from the danger of multiple liability; consequently, they withheld payment until a final judicial determination, pro-

viding full protection to the Government's interest, could be obtained.

The court below resolved the question of ownership in favor of respondents but went far beyond its powers by assessing a substantial penalty against the Government in the form of an award of interest on the fund. Section 177 (a) of the Judicial Code forbids the Court of Claims to include interest in its judgments on claims against the United States unless the award is grounded on an express contractual stipulation or permitted by specific statutory provision. The award of interest in this proceeding does not fall within either of the exceptions to that Section. Nevertheless, the court below, ignoring Section 177 (a) and misconceiving both the Government's position and its own function in the proceeding, has here assumed a general power to award interest whenever its view of the circumstances of a particular case leads it to believe that such an award is warranted. We submit that the court below possesses no such power and that its action in awarding interest in this proceeding should be set aside.

Respondents contend that Section 177 (a) of the Judicial Code is not applicable here because the Section applies only to original claims and hence is not applicable to this proceeding which is based on a pre-existing judgment. But, in the first place, this was not a proceeding to enforce a

pre-existing judgment. It was, as we have stated above, one of three related proceedings brought to determine the ownership of an existing fund. The fund had come into existence after a Customs Court proceeding and a reliquidation of customs entries by the Collector of Customs. But no question of ownership was presented to, or adjudicated by, the Customs Court. That issue arose subsequent to the Customs Court proceedings and was first brought under adjudication by this suit and its companion proceedings in the court below. Moreover, the court below does not possess jurisdiction over a suit against the United States if the sole basis of jurisdiction urged is a prior judgment against the Government. It is only when such suits can be categorized as arising under a law of Congress that the court below has jurisdiction to entertain them. In such cases, Section 177 (a) is entirely applicable and awards of interest are forbidden unless specifically permitted by contract or statute. In the second place, even if it be assumed that Section 177 (a) does not apply to suits based on pre-existing judgments, that this suit was on such a judgment, and that the court below has jurisdiction over such suits, it does not follow that the award of interest by the court below in this proceeding is thereby validated. Judgments against the United States only bear interest pursuant to a specific statutory authorization. Congress has not author-

ized and does not intend the allowance of interest on Customs Court judgments. This is conclusively shown by the consistent administrative practice of the Treasury Department in denying payments of interest on customs refunds, and the acquiescence of Congress, on numerous occasions, in this construction of the applicable statutes and the administrative practice. Specific customs regulations, embodying this prohibition against awards of interest on customs refunds, were violated by the court below in awarding interest in this proceeding.

II

Respondents contend that the award of interest is validated by the Act of March 3, 1875, *supra*, pp. 3-4. This statute directs the Comptroller General to withhold payment from a judgment creditor if such creditor is indebted to the United States, and to cause suit to be brought on the asserted cross debt. It permits interest to be paid to the judgment creditor for the period of the withholding if the Government fails to substantiate its asserted set-off. We submit that this statute has no applicability to this proceeding. It was never intended to apply to a situation where payment of an acknowledged liability was withheld because the Government's disbursing officers were unable to ascertain the ownership of the fund in question in a manner which would

fully protect the Government from the danger of multiple liability. On the contrary, the Act of March 3, 1875 contemplates only a case involving the refusal by the Government, for set-off purposes, to pay an acknowledged liability to a fully identified claimant. This proceeding does not and did not involve the assertion of any cross debt or set-off by the United States and, accordingly, the statute has no applicability. We further suggest that the Act of March 3, 1875 is here inapplicable in that it contemplates only judgments which can be presented for payment, and that the Customs Court judgments herein, coupled with reliquidation by the Collector, constitute no more than "claims duly allowed by legal authority", a category which was deleted from the coverage of the 1875 Act by the 1933 amendment to it.

ARGUMENT

I

THE AWARD OF INTEREST AGAINST THE UNITED STATES WAS BEYOND THE POWER OF THE COURT OF CLAIMS

By this proceeding, and the companion suits brought by Rayon #1 and Nyrayco,[13] the Court of Claims was called upon to determine the ownership of a customs duty refund, held in the Treasury as an outstanding liability, of approxi-

[13] Nos. 45862 and 45863 in the Court of Claims. This proceeding was No. 45861 in the court below.

mately $400,000. The Government's disbursing officers had withheld payment, not because of any general denial of the Government's liability for the fund, but because of a complex situation, arising out of activities of respondents and others, in which an administrative decision as to ownership of the fund was deemed inadequate to protect the Government from the danger of multiple liability.[14]

The refund in issue resulted from a reliquidation of customs entries in conformity with a decision of the Customs Court. The customs duties had originally been paid by Rayon #1 and Nyrayco (R. 10), the protestants in the Customs Court action. Shortly after the refunds were awarded, respondent Rayon #2, claiming as successor to Rayon #1 and Nyrayco, demanded payment (R. 17). However, Rayon #2 was not a party to the Customs Court proceedings and the general assignments through which Rayon #2 asserted its rights were apparently void with respect to the customs claims under R. S. 3477 (31 U. S. C. 203),[15] a statute designed to protect the

[14] The Government may, of course, be subjected to multiple payments on the same claim when its fiscal officers choose the wrong claimant. See *United States* v. *Borcherling*, 185 U. S. 223.

[15] The general transfers of assets to Rayon #2 (R. 10–14), being voluntary assignments as distinguished from assignments by operation of law (compare *Western Pac. R. Co.* v. *United States*, 268 U. S. 271, 275) and taking place prior to the Customs Court award, may well have been void insofar

Government from the "* * * danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Hobbs* v. *McLean*, 117 U. S. 567, 576. Moreover, Rayon #1 and Nyrayco, as well as Rayon #2, had each ceased doing business and had been dissolved long before the decision of the Customs Court (R. 15–16). The fact that Nyrayco had been dissolved by proclamation for nonpayment of franchise taxes was never brought to the attention of the Customs Court (R. 16).[16]

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as they purported to assign to Rayon #2 the claims of Rayon #1 and Nyrayco for refund of customs duties. R. S. 3477 provides that "all transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *" *The John Shillito Co.* v. *McClung*, 51 Fed. 868, 877 (C. C. A. 6). Moreover, the transfers did not meet the formal requirements of an assignment of claims against the United States as set forth in R. S. 3477. *Spofford* v. *Kirk*, 97 U. S. 484; *United States* v. *Gillis*, 95 U. S. 407; *H. M. O. Lumber Co.* v. *United States*, 40 F. 2d 544 (W. D. Mich.).

[16] Under New York law, it was doubtful whether a corporation, which had been abolished by proclamation for nonpayment of franchise taxes, had capacity to maintain a suit. The cases were in conflict. Compare *Douglas* v. *Perlstein*, 170 Misc. 561 (right to sue upheld), and *Application of S. M. & J. Eisenstadt, Inc.*, 256 App. Div. 488, affirmed, 283 N. Y. 578 (right to sue denied). The court below decided that this uncertainty was not removed until two successive amendments to the New York Corporation Law were enacted by the legislature in 1940 and 1941 (R. 23–26).

Nor does the record show that the respondents ever disclosed the dissolution of Rayon #1 and Rayon #2 to that court. Additional complexities arose through the death of corporate officials (R. 18, 19) and the presence of foreign corporations with beneficial or legal rights in the stock of the dissolvee corporations involved (R. 15).

The Government's disbursing officers were thus confronted with the necessity of resolving questions as to the validity of assignments, the capacity of dissolved corporations to sue under state law, and the legal standing of various claimants to receive the fund after it had been established, in order to determine ownership of the fund.[17] They were unwilling to assume this essentially judicial function (*United States* v. *Borcherling*, 185 U. S. 223, 234–235; *Martin* v. *National Surety Co.*, 300 U. S. at 595) and, they therefore decided to withhold payment until such time as a final judicial determination, providing an acquittance fully protective of the Government's interest, should be obtained. The proceedings below resulted in such a determination, binding not only the three primary claimants but also all other impleaded and cited parties. In these proceedings,

[17] Even after the facts were marshalled before it, the court below described the case as presenting a "* * * maze of reorganizations and transfers of assets and confusion * * *" (R. 25) with issues "confused by the dissolution and reorganization of corporations, stock transfers and board meetings, as well as the numerous parties to the various transactions * * *" (R. 22).

the Government stood as stakeholder, the "* * * fund * * * in court to be distributed to rival claimants, with the Government discharged irrespective of the outcome." *Martin* v. *National Surety Co.*, 300 U. S. at 595.[18]

The court below, in determining the ownership of the fund, performed one of the functions for which it was created. *United States* v. *Borcherling*, 185 U. S. at 234. However, in assessing a substantial penalty against the Government in the form of interest, it went far beyond its powers. We submit that its action in awarding interest should be set aside.

[18] Respondents, in seeking to emphasize the fact that the Government did not offer evidence in the court below (Br. in Op. 5), misconceive the Government's position in the litigation. As stated above, the Government never denied its obligation to pay the fund to its rightful owner; the problem was the determination of the rightful owner by a court of competent jurisdiction. Similarly, respondents' statements to the effect that the Government conceded its liability to pay the claim of Rayon #1 (Br. in Op. 5; Pet. 9) and that the Government conceded the valid ownership by Rayon #2 of the customs refund claims of Rayon #1 and Nyrayco (Br. in Op. 5), are inaccurate. Again, the Government merely conceded its liability to pay the fund to someone; it did not concede any liability to pay any part of the fund to any particular claimant, the very issue on which it desired the judgment of the court below.

It should be noted that the Government did controvert one issue, the question of Nyrayco's capacity to appear as plaintiff in the Customs Court after it had been abolished for nonpayment of franchise taxes. The confused state of New York decisional law on this point and on the history of New York Corporation Law amendments is discussed in the opinion below (R. 23–26; see also *supra*, note 16, p. 20).

A. *The award of interest was barred by Section 177 (a) of the Judicial Code.*

By Section 177 (a), the Court of Claims is forbidden to include interest in its judgments on claims against the United States. This statutory limitation on the powers of the court below, an integral part of the Government's waiver of immunity as to cases cognizable in that court, embodies the traditional immunity of the sovereign from payment of interest on claims against it. *United States* v. *Goltra*, 312 U. S. 203, 207; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *North Carolina*, 136 U. S. 211, 216; *Angarica* v. *Bayard*, 127 U. S. 251, 260. Section 177 (a) permits of two specific exceptions: interest on claims before it may be awarded by the Court of Claims where the award is grounded on an express contractual stipulation or when it is permitted by a specific statutory provision. *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *Verdier*, 164 U. S. 213, 218. Absent the specific basis of exception, the limitation of Section 177 (a) is absolute. Here, of course, there was no contractual stipulation, and the appropriation acts which covered the refunds here involved (R. 17) contained no provision permitting an allowance of interest. Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149.

The court below, in awarding interest herein, completely ignored the statutory limitation thus placed on its own power. It rested its award on reasons which are questionable even apart from Section 177 (a), wholly irrelevant to a determination of whether Section 177 (a) applies here. First, the court chose to start the running of interest on a date (April 19, 1941) which only had significance with respect to Nyrayco's capacity to sue (R. 26). This was the date of a second amendment to the New York Corporation Law which retroactively clarified the capacity to sue of involuntarily dissolved corporations. See *supra*, note 16, p. 20. The court below described this amendment as having "* * * made clear the right of corporations dissolved under the tax law to maintain suits * * *" (R. 25). To the extent that the amendment is relevant at all, it merely clarified Nyrayco's status in the customs suit; it had no bearing on the rights of any of the other parties, and could not determine the question of ownership of the fund. Conceding that no allowance of interest would be "* * * right or just * * *" prior to April 19, 1941 (R. 25), the court below nevertheless sought to utilize the amendment and its date as a justification and point of departure for the allowance of interest on both customs court judgments, one in

favor of Nyrayco and the other in favor of Rayon #1." We submit that if the Comptroller General was justified in withholding payment before that date—as the court below conceded—, he was justified in withholding payment thereafter, because the state law amendment did not resolve the primary issue presented below, namely, the ownership of the refund.

Further, the court below, after admitting that arrangements short of judicial determination might not have sufficiently protected the United States,[20] stated that the Comptroller General "* * * could have suggested * * *" a suit in the Court of Claims, but that he did not so suggest until 1942 (R. 25–26). This was found to furnish "* * * an added reason * * *" for allowing interest after April 19, 1941 (R. 26).

[19] The date chosen by the court below to start the running of interest was almost a year before the consent declaratory judgment obtained by respondents in the New York Supreme Court (R. 17), and substantially two years before attorneys for the interested corporations offered to give the consent of Rayon #2 if the fund were released to Rayon #1 and Nyrayco (R. 17–18).

[20] The suggestion of the court below that the Comptroller General "* * * could have permitted transfers and assignments by all interested parties * * *" (R. 26) again ignores the complexities here, involving both state and federal law, which confronted the Government's fiscal officers. These complexities the judgment of the court below resolved without elucidation. In any event, the suggestions made by the court below afford no justification for its defiance of Section 177 (a).

These reasons offered by the court below in support of its award of interest are in themselves inconsistent and incorrect, and indicate a misconception of the position of the Government's disbursing officers and the court's own function. The Comptroller General is improperly credited with judicial power to resolve the issue of ownership by a protective decree, a power which the court below alone possessed. Cf. *United States* v. *Borcherling*, 185 U. S. at 234. At the same time, the Comptroller General is criticized for not having "suggested" a suit against the United States earlier than 1942, a criticism which necessarily recognizes the need for a judicial determination of the question of ownership. The burden of establishing ownership of the fund did not shift to the Comptroller General, nor could the date of his suggestion of suit in the court below have any relevance to the allowance of interest. While addressing itself to a supposed duty in the Comptroller General, the court below ignored the primary duty of the respondents to establish that they were entitled to the fund. Cf. Customs Regulations, 1931, Art. 1191, p. 736, Appendix B, *infra*, p. 49. If the respondents were competent to receive the fund, they were free to resort to suit in the Court of Claims at any time after the initial withholding, and thus cannot be absolved of responsibility for the delay in the determina-

tion of ownership.[21] Yet the court below has not merely absolved respondents of such responsibility but has rewarded them with interest for a period of delay which they might have avoided. If the respondents were not competent to bring the suit, the Government should not be penalized for their incompetency.

We do not believe that the Comptroller General here acted unreasonably in withholding payment until the ownership of the customs refund had been determined by a court of competent jurisdiction. But even if it be assumed that his actions were unreasonable, it does not follow that any power thereupon arose in the Court of Claims to override Section 177. (a) of the Judicial Code and to award interest to the respondents. On the contrary, this Court has consistently held that that Section prohibits the allowance of interest even if payments have been unreasonably delayed by officers of the Government. *Tillson* v. *United States,* 100 U. S. 43; *United States* v. *Verdier,* 164 U. S. 213, 218. Without regard to these well-

[21] The consent declaratory judgment obtained by the respondents in the Supreme Court of New York in 1942, and their offer to furnish releases (R. 17–18) only affected rights as between Rayon #1 and Nyrayco, on the one hand, and Rayon #2 on the other. This non-adversary proceeding provided no protection to the Government as against the other possible claimants who were subsequently impleaded and cited in the Court of Claims action (R. 26). Cf. *United States* v. *Borcherling,* 185 U. S. at 235.

established principles and in defiance of the statutory prohibition, the court below has baldly assumed a general power to award interest on claims against the United States whenever its view of the circumstances of a particular case leads it to believe that such an award is warranted. We submit that the court below possesses no such power.

Respondents urge, however, that Section 177 (a) of the Judicial Code is not applicable because that Section applies "* * * only to original claims which have not previously been reduced to judgment * * * ," and this proceeding "* * * was based on pre-existing judgments" (Br. in Op. 7). We submit that there is no merit to this contention. As already stated, *supra*, pp. 4–5, 18, this was one of three related proceedings brought in the court below to determine the ownership of a fund. The fund resulted from a Customs Court decision on a point of customs classification and a subsequent reliquidation of customs entries by the Collector, and was thereafter carried in the Treasury Department as an admitted debt of the Government. But the problem litigated below, the question of ownership of the fund, was never before the Customs Court. That question was brought under adjudication for the first time by this suit and its companion pro-

ceedings."[2] Indeed, Rayon #2, and its liquidating directors, the successful claimants in the court below and the parties with whose rights we are now concerned, were not even parties to the Customs Court proceeding (R. 10, 16). Thus, this proceeding was in no sense a suit to enforce a judgment. On the contrary, it was part of a consolidated litigation, instituted in the court below for the purpose of determining ownership of an existing fund.

Were the respondents' view of this proceeding as a suit to enforce a prior judgment a correct one, the court below would have had no jurisdiction. The Court of Claims lacks power to entertain a suit against the United States if the sole basis of jurisdiction is a prior judgment against the United States. *Hetfield* v. *United States*, 78

[2] In this proceeding (No. 45861 in the Court of Claims), respondents prayed for judgment for the entire fund (R. 6–7). In No. 45862 in the Court of Claims, the suit brought by Rayon #1, the complaint prayed for judgment in the amount of $362,482.71, that portion of the fund which derived from the customs proceeding brought by Rayon #1. In No. 45863 in the Court of Claims, the suit brought by Nyrayco, the complaint prayed for judgment in the amount of $30,809.75, that portion of the fund which derived from the customs proceeding brought by Nyrayco. Both Rayon #1 and Nyrayco alleged the reorganization of 1939 with its transfer of their assets to Rayon #2, but further alleged that, as a matter of law, the ownership of their respective claims for the refund of customs duties remained in them.

C. Cls. 419.[23] Suits involving preexisting judgments against the United States or assumed by the United States can only come within the jurisdiction of the Court of Claims when they also fall into the category of claims arising under a law of Congress. Section 145 of the Judicial Code, 28 U. S. C. 250 (1); *Hetfield* v. *United States,* 78 C. Cls. at 422; *Benedict* v. *United States,* 66 C. Cls. 437; *Bloodgood* v. *United States,* 39 C. Cls. 69. The "law of Congress" is customarily an appropriation act and such suits are characterized as suits to obtain a fund. Section 177 (a) is applicable in such proceedings unless the appropriation act involved specifically permits an allowance of interest. *Benedict* v. *United States, supra,* at 438, 444; *Bloodgood* v. *United States, supra;* cf. *New York Central and Hudson River R. R. Co.* v. *United States,* 24 C. Cls. 22, 30. As has been noted, *supra,* p. 23, the appropriation acts which covered the refunds here involved (R. 17) contain no such provision.

Thus, respondents' contention that the prohibition of Section 177 (a) does not apply because this

[23] To support the contention that Section 177 (a) is not applicable to pre-existing judgments, respondents quote a dictum from *Stewart & Co.* v. *United States,* 71 C. Cls. 126, 131. The *Stewart* case involved an asserted set-off by the United States against a claimant who had obtained a prior judgment in the Court of Claims. The case, since it involved a set-off, came within the Act of March 3, 1875, *supra,* insofar as the question of interest is concerned. The *Stewart* case is discussed in *Hetfield* v. *United States, supra,* at 421–422.

proceeding was a suit on a preexisting judgment cannot advance their cause. The proceeding was in fact one to determine the ownership of an existing fund and, even if considered as based upon a preexisting judgment, is subject to the bar of Section 177 (a) in the absence of specific authorization to the contrary.

B. *Even if it be assumed that Section 177 (a) is inapplicable to suits on pre-existing judgments, and that this was such a suit, the award of interest herein was beyond the power of the court below*

Respondents' effort to avoid the prohibition of Section 177 (a), by emphasizing that this proceeding was based on pre-existing judgments, seems to assume that judgments against the United States automatically bear interest. There is no warrant for this assumption. Judgments against the United States, like other claims against the United States, only bear interest pursuant to a specific statutory authorization. For example, judgments of the Court of Claims do not bear interest unless the United States unsuccessfully appeals to this Court from an adverse judgment. Act of September 30, 1890, as amended, 26 Stat. 537, 31 U. S. C. 226. Even under this narrow authorization, payment of interest is not permitted to run after the term of this Court in which the Court of Claims judgment is affirmed. *Ibid.* District Court judgments under the Tucker Act bear

interest from the date of final judgment until the date when an appropriation is made for the payment of the judgment. Act of March 3, 1887, as amended, Section 10, 24 Stat. 507, 28 U. S. C. 765. Section 411 of the Federal Tort Claims Act incorporates the Tucker Act provision with regard to interest on judgments. Act of August 2, 1946, Pub. L. 601, 79th Cong., 2nd Sess. See also Suits in Admiralty Act, Section 3, 41 Stat. 526, 46 U. S. C. 743; Public Vessels Act, Section 2, 43 Stat. 1112, 46 U. S. C. 782. Thus, where Congress intends to permit the allowance of interest on judgments against the United States, specific statutory authorization exists. Such enactments "* * * rest within easy Congressional control" (*United States* v. *Nunnally Investment Co.*, 316 U. S. 258, 264) and the necessary statutory authorization may not be presumed from Congressional silence. *Tillson* v. *United States*, 100 U. S. at 46; *United States* v. *North American Co.*, 253 U. S. at 336; *Angarica* v. *Bayard*, 127 U. S. at 260. There is no statutory authorization for the payment or allowance of interest on Customs Court judgments and, accordingly, we submit that interest on such judgments against the United States may not be allowed.

That Customs Court judgments do not bear interest is made abundantly clear by the consistent administrative practice in this regard, acquiesced in by Congress on numerous occasions.

The Customs Court, originally known as the Board of General Appraisers, was created by the Customs Administrative Act of 1890, 26 Stat. 131, as part of "* * * a comprehensive and interrelated scheme of administrative and judicial remedies * * *" (*United States* v. *Nunnally Investment Co.*, 316 U. S. 258, 264) with exclusive jurisdiction in classification and appraisement cases. *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (C. C. A. 2); *Gottman Co.* v. *Dailey*, 94 F. 2d 85 (C. C. A. 4), certiorari denied, 299 U. S. 566; *Riccomini* v. *United States*, 69 F. 2d 480 (C. C. A. 9).[24] As

[24] The exclusive system thus established replaced cumbersome procedures theretofore available for protesting the appraisal rulings of customs officials. See Act of March 1, 1823, 3 Stat. 735–736; Act of May 28, 1830, 4 Stat. 409; Tariff Act of 1842, 5 Stat. 564; Act of March 3, 1851, 9 Stat. 630; Act of March 3, 1857, 11 Stat. 195; Act of June 30, 1864, 13 Stat. 215; R. S. 2608, 2609, 2611, 2931, 2932, 2945, 3011, 3012; Freund *Administrative Powers over Persons and Property*, pp. 553–560. It also eliminated, in appraisement and classification cases, the device of a suit against a collector of customs for the recovery of excess duties (R. S. 3011) with an assumption by the United States of liability for the judgment upon the issuance of a writ of probable cause (R. S. 989; 28 U. S. C. 842). Even where the United States had thus assumed liability for a judgment against a collector, it was not liable for interest on the judgment in the absence of express statutory authorization. *United States* v. *Sherman*, 98 U. S. 565; *White* v. *Arthur*, 10 Fed. 80 (S. D. N. Y.); *Stephani's Case*, 26 Int. Rev. Rec. 313; cf. *United States* v. *Kales*, 314 U. S. 186, 199–200; *Sage* v. *United States*, 250 U. S. 33, 37. However, final judgment against a collector included interest from the date of collection of the duties until the date of rendition of judgment. See *Cochran* v. *Schell*, 107 U. S. 625; *Huntley*

stated above, the Act of 1890 contained no provision authorizing the allowance of payment of interest on refunds. See 26 Stat. 140.[25] Within a year after the passage of the statute, the Secretary of the Treasury requested an opinion by the Attorney General on the question whether authority existed for the payment of interest upon refunds made in conformity with judgments. The Attorney General ruled that no such authority existed and that such interest could not be paid. 20 Op. A. G. 238. Following this opinion, on August 11, 1891, the Assistant Secretary of the Treasury directed all collectors of customs that "* * * no interest is to be allowed upon refunds made in conformity with judgments obtained in cases of appeal under the act of June 10, 1890." T. D. 11616. Since 1890, the consistent administrative practice has been in conformity with this ruling. See Appendix A, *infra*, pp. 47–48; *Marine* v. *Lyon*, 62 Fed. 153 (C. C. A. 4); T. D. 15050; Customs Regulations, 1892, Art.

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v. *Southern Oregon Sales, Inc.*, 104 F. 2d 153, 154 (C. C. A. 9). The Government's liability for the interest included in the judgment against a collector presented a serious fiscal problem (19 Cong. Rec. 702–708) and Congress sought to reduce this burden by limiting the award of interest against a collector prior to judgment to three per cent. R. S. 3011, as amended by the Act of February 1, 1888, 25 Stat. 6.

[25] The Customs Administrative Act of 1890, *supra*, eliminated even the limited right of an importer to interest prior to judgment, *supra*, note 24, by repealing R. S. 3011 without substituting any equivalent provision. 26 Stat. 131, 141–142; cf. 19 U. S. C. 1513.

935, p. 392; Customs Regulations, 1899, Art. 1477, p. 517; Customs Regulations, 1908, Art. 1084, p. 445; Customs Regulations, 1923, Art. 787, p. 410; Customs Regulations, 1931, Art. 862, pp. 536–537; Customs Regulations, 1937, Art. 861, p. 490; Customs Regulations, 1943, Art. 17.4, p. 327 and Art. 24.36, p. 456, note 6; see *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760, 764 (C. C. A. 2). During the period between 1890 and the present time, Congress has not authorized the payment of interest on refunds made in conformity with judgments of the Customs Court, although it has from time to time reenacted and, in other ways, amended, the Customs Administrative Act. Act of August 5, 1909, 36 Stat. 103; Act of October 3, 1913, 38 Stat. 191; Act of September 21, 1922, 42 Stat. 973; Act of June 17, 1930, 46 Stat. 739, as amended by the Act of June 25, 1938, 52 Stat. 1086, 19 U. S. C. 1520; Act of June 26, 1934, 48 Stat. 1225.

This consistent administrative construction and practice, based upon an opinion of the Attorney General and acquiesced in by Congress on numerous occasions, conclusively demonstrates that Congress does not intend, and has not authorized, the award or payment of interest on custom duty refunds made in conformity with Customs Court decisions. *United States* v. *Falk*, 204 U. S. 143.[26]

[26] In the *Falk* case, this Court relied upon a consistent administrative construction by the Treasury Department of a section of the Customs Act of 1890, based upon an opinion of the Attorney General and acquiesced in by Congress.

Accordingly, we submit that, even if Section 177 (a) be considered inapplicable to this proceeding, the court below lacked power to award interest on the Customs Court judgments involved, and its action herein, in awarding such interest, is in violation of the applicable Customs Regulations, here, the Regulations of 1937. Appendix B, *infra*, pp. 49–50.

II

THE ACT OF MARCH 3, 1875 IS ENTIRELY INAPPLICABLE IN THE CIRCUMSTANCES OF THIS CASE.

Respondents seek to support the award of interest by the court below by invoking the Act of March 3, 1875, and, indeed, urge, in their cross-petition for a writ of certiorari (No. 96), that the amount of interest awarded by the court below should be increased. It should be noted that the court below did not refer to the Act of March 3, 1875, but sought to justify its award of interest by reasons entirely unrelated to the provisions of that Act. See *supra*, pp. 24–25. It is the Government's view that the Act of 1875 is wholly inapplicable to this case; if it be deemed applicable, however, the Government consents to the granting of the relief requested by the respondents in their cross-petition.

The Act of March 3, 1875, provides that: (1) When a claimant presents a final judgment against the United States to the Comptroller

General for payment, and such claimant is indebted to the United States; (2) it is the duty of the Comptroller General to withhold payment of the judgment, as an offset, against the indebtedness of the claimant to the United States; (3) if the claimant denies his indebtedness to the United States, it is the duty of the Comptroller General to cause suit to be brought on the claimant's indebtedness; and (4) if in such action judgment is rendered against the United States in the whole or part of the amount initially withheld by the Comptroller General, interest may be paid on any balance owed to the claimant from the time of the initial withholding. See *supra*, pp. 3–4.

This statute does not, on its face, and was never intended to, apply to a situation where, as here, the failure to pay a customs refund resulted from the inability of Government officials to determine the person entitled thereto and where that inability resulted from a maze of reorganization, and assignments probably not made in conformity with R. S. 3477 (see, *supra*, note 15, pp. 19–20), followed by dissolution of the corporate claimants. In contrast, the Act of 1875 contemplates only a case involving the refusal by the Government to pay an acknowledged liability to a fully identified claimant for set-off purposes. It "only provides a way of payment and satisfaction if the creditor shall, at the time of the presentation of his judgment, be a debtor of the United States * * *." *United States* v. *Jones*, 119 U. S. 477, 480.

A. *The Act of 1875 applies only when the United States has withheld payment under an assertion of set-off*

The United States, even without specific statutory authority, has the power and right to effect accounting set-offs and adjustments in connection with claims presented to it for payment; it may do so in "the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States,* 15 Pet. 336, 370; *McKnight* v. *United States,* 98 U. S. 179, 186. The Act of 1875 affirmatively requires the Comptroller General to assert, and have adjudicated, any set-offs which the United States may have against a judgment creditor (*Bonnafon* v. *United States,* 14 C. Cls. 484, 489–490; *United States* v. *La Grange Grocery Co.,* 31 F. 2d 297, 298 (N. D. Ga.)) and "* * * prescribes the procedure for enforcing [such] set-off." *United States* v. *Ennis,* 132 Fed. 133, 134 (D. N. J.). The Act compensates the claimant by payment of interest in the event that the Government's assertion of set-off is not upheld.

But the Act applies only where the Government asserts a set-off against the judgment claimant. As indicated by its title, it is "An Act to provide for deducting any debt due to the United States from any judgment recovered against the United

States by such debtor." 18 Stat. 481. Every provision of the statute relates solely to the assertion and litigation of a cross debt. It is the unsuccessful assertion of a set-off by the United States which, under the statute's provisions, withdraws a claim from the prohibition of Section 177 (a). *United States* v. *New York C. & St. L. R. Co.*, 32 Fed. 887, 890–891 (C. C. A. 6).

In every case which we have found in which the Act of 1875 has been cited as authorization for the allowance of interest against the United States, payment had been withheld from the claimant for the purpose of asserting a set-off.[27] No case cited

[27] *United States* v. *LaGrange Grocery Co.*, 31 F. 2d 297, 298 (N. D. Ga.); *United States* v. *New York, C. & St. L. R. Co.*, 32 F. 2d. 887, 888 (C. C. A. 6); *Lloyd-Smith* v. *United States*, 71 C. Cls. 74, certiorari denied, 283 U. S. 836; *Mohawk Condensed Milk Co.* v. *United States*, 70 C. Cls. 671, 672; *Helvetia Milk Condensing Co.* v. *United States*, 74 C. Cls. 142, 150; *Highland Milk Condensing Co.* v. *United States*, 74 C. Cls. 267, 268; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, 744, certiorari denied, 290 U. S. 671; *Highland Milk Condensing Co.* v. *United States*, 77 C. Cls. 745, 746, certiorari denied, 290 U. S. 671; *American Cyanamid Co.* v. *United States*, 78 C. Cls. 313; *American Potash Co.* v. *United States*, 80 C. Cls. 160, 162; *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, certiorari denied, 296 U. S. 599; *R. J. Reynolds Tobacco Co.* v. *United States*, 82 C. Cls. 545, 549; *Whitbeck, Receiver* v. *United States*, 77 C. Cls. 309, 332, certiorari denied, 290 U. S. 671; *Aluminum Cooking Utensil Co.* v. *United States*, 90 C. Cls. 187; *Aluminum Co. of America* v. *United States*, 87 C. Cls. 96, 126; *Chicago I. & L. Ry. Co.* v. *United States*, 78 C. Cls. 96, 98; *Stewart & Co.* v. *United States*, 71 C. Cls. 126, 127; *Standard Dredging Co.* v. *United States*, 71 C. Cls. 218, 237; *Converse* v. *United States*, 75 C. Cls. 542; cf. *Aluminum Co. of America* v. *United States*, 90 C. Cls. 173, 183.

by respondents here or in the court below holds that the Act of 1875 permits an award of interest against the Government in the absence of an asserted set-off by the Government at the time of withholding payment.[28]

Moreover, we do not believe that the Act of 1875 authorizes the payment of interest to a judgment claimant unless the cross indebtedness asserted by the United States has been actually litigated. The statute directs the Comptroller General to bring suit on the alleged cross indebtedness and only permits interest "* * * if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld * * *" 31 U. S. C. 227. Although some cases have indicated that the mere assertion of a cross debt by the United States against a judgment claimant suffices to bring the case within the provisions of the Act of 1875 as to awards of interest (cf. *American Potash Co.* v. *United States*, 80 C. Cls. 160), the most recent

[28] In their brief in opposition to the Government's petition (Br. in Opp. 9), respondents placed their chief reliance on *American Potash Co.* v. *United States*, 80 C. Cls. 160, describing it as "squarely in point." It is obviously not in point. There the Court of Claims specifically found that "The Comptroller General withheld payment of the [tax] refund duly allowed by legal authority and stopped payment of the check *on the ground that plaintiff might be indebted to the United States on account of taxes for other years* * * *." *Id.*, at 162 (italics added).

relevant decision refused to permit interest under the statute where an asserted cross indebtedness had not been finally determined, presumably by the judgment of a court. *Richmond F. & P. R. Co.* v. *United States,* 95 C. Cls. 244; cf. *Hines* v. *United States ex rel. Marsh,* 105 F. 2d 85, 88 (App. D. C.); *Richmond, F. & P. R. Co.* v. *McCarl,* 62 F. 2d 203, 208 (App. D. C.), certiorari denied, 288 U. S. 615. However, whether or not the Act of 1875 (insofar as it permits interest to judgment claimants) comes into operation only where the Government's set-off is actually litigated, no case has permitted the payment of interest to a judgment claimant by reason of the statute where, as here, there has not even been an assertion of set-off or cross indebtedness.

Respondents' contention herein amounts to no more than a naked assertion that, since recognized owners of undisputed judgment claims against the United States are permitted by the Act of 1875 to recover interest in a special situation, all judgment claims against the United States bear interest under the same statute without regard to the occasion for the withholding of payment. But the principle of the Government's immunity from awards of interest, embodied in Section 177 (a), applies rigorously (*United States* v. *North American Co.,* 253 U. S. 330, 336) and is only avoided when Congress has expressly waived

such immunity by relevant special statute.[29] *Tillson* v. *United States*, 100 U. S. 43, 46; *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Goltra*, 312 U. S. 203, 207. Respondents ask in substance, that the Act of 1875 be rewritten so as to apply to a situation clearly beyond its present scope. We submit that such a modification of the Act may be effected only by Congress, and that where the withholding of payment of a judgment is not the result of the assertion of a set-off, the Act of March 3, 1875, *supra*, pp. 3–4, is not applicable. *New York Central and H. R. R. Co.* v. *United States*, 24 C. Cls. 22.

B. *Respondents do not rely on a judgment within the meaning of the Act of 1875, as amended*

The Act of 1875 provides that when "any final judgment * * * shall be presented * * * for payment, and the plaintiff therein shall be indebted to the United States," the Comptroller General shall withhold an amount sufficient to offset the claimant's debt to the United States. We suggest that the statute contemplates only judgments which can be presented *"for payment"*

[29] As shown above, Congress has specifically provided for the allowance of interest on various types of judgments against the United States (*supra*, pp. 31–32). These specific authorizations leave ample scope for a proper application of the interest provisions of the Act of March 3, 1875.

and which are susceptible of a set-off, and that the Customs Court judgments herein, which merely determined a question of classification, are not judgments of that sort.

As originally enacted, the Act of 1875 referred to either a "final judgment recovered against the United States or other claim duly allowed by legal authority." 18 Stat. 481. In 1933, Congress amended the act by confining its application to final *judgments* as distinguished from *claims* duly allowed by legal authority. Act of March 3, 1933, 47 Stat. 1516, 31 U. S. C. 227; *Whitbeck, Receiver* v. *United States,* 77 C. Cls. 309, 342–343, certiorari denied, 290 U. S. 671. The amendment was intended to relieve the Comptroller General of the duty of litigating set-offs on behalf of the United States against any but judgment claimants, and to limit to such judgment creditors the preferential treatment theretofore afforded to a wider class of claimants when faced by withholding under an assertion of cross debt. S. Rep. No. 1021, 72nd Cong., 2nd Sess., H. Rep. No. 2182, 72nd Cong., 2nd Sess.

Examination of the basis of respondents' claims herein reveals that they do not exclusively rely on the "judgment" of the Customs Court as such, but also on subsequent administrative proceedings. The decision and judgments of the Customs Court did not, of themselves, make respond-

ents judgment creditors within the meaning of the 1875 Act. They sustained a protest on a point of customs classification and directed the Collector of Customs to make "* * * a reliquidation accordingly of the customs entries covering the shipments of rayon yarns" (R. 16). No payment of money was directed by such judgments.[30] If the judgment alone had been presented to the Comptroller General for payment, aside from the other questions involved in this case, payment would rightfully have been refused because administrative steps necessary to the ascertainment of the refunds had not been taken. See Customs Regulations, 1937, Art. 856, p. 489; Art. 861, p. 490; Art 1190 (a), p. 682; and Art. 1201, p. 692, Appendix B, *infra*, pp. 49–52. After judgment, the Collector of Customs must reliquidate the entries in accordance with the decision of the Customs Court. 19 U. S. C. 1515; Customs Regulations, 1937, Art. 856, p. 489. Payment of refunds is not authorized until the amount thereof has been ascertained by reliquidation and certified by the Collector as a "person(s) by law duly

[30] The judgment of the Customs Court is not a money judgment (*United States* v. *Calogera*, T. D. 31729 (S. D. N. Y.); *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760, 764 (C. C. A. 2); but compare, *United States* v. *Davis*, 54 Fed. 147 (C. C. A. 8)); it is a declaratory decree and a direction to the collector, as the Tariff Acts require, to reliquidate the entry accordingly. *Brooks* v. *Mandel-Witte Co.*, 54 F. 2d 992, 994 (C. C. A. 2).

authorized to incur obligations on behalf of the United States." Customs Regulations, 1937, Art. 1190 (a); Customs Regulations, 1943, Art. 2436, p. 456; 19 U. S. C. 1520. Whatever description may be applied to these functions of the Collector, it is clear that these administrative steps, taken after judgment in the Customs Court and not forming part of such judgment, constitute the basis for payment by the United States.[31]

A Customs Court judgment is therefore not in itself susceptible of presentation for payment or available for set-off within the meaning of the Act of 1875, as amended in 1933. Together with the above described subsequent administrative steps, it is "* * * an award in favor of the importer by competent legal authority" (*Tserioni* v. *United States;* 94 C. Cls. 142, 147, certiorari denied, 314 U. S. 668) and, as such, falls within the category of "claim(s) duly allowed by legal authority" which was deleted from the coverage of the Act of 1875 by the 1933 amendment.

[31] The place of these administrative steps in the chain of events leading to perfection of a claim for a customs duty refund was necessarily recognized by respondents herein. Their complaint alleged that they became entitled to refunds as "* * * the result of said judgments and the reliquidation of the customs entries made pursuant thereto by the Collector * * *" which were "* * * duly certified by the Collector * * * to the proper disbursing officer for payment * * *" (R. 4). Similar allegations were made in the related suits, Nos. 45862 and 45863, in the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded with instructions to eliminate the allowance of interest.

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DECEMBER 1946.

APPENDIX A

OFFICE OF THE COMMISSIONER

Address Reply To
Commissioner of Customs

In Reply Refer To
142.52

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
WASHINGTON 25

Nov. 25, 1946.

Honorable JOHN F. SONNETT
Assistant Attorney General
Department of Justice
Washington 25, D. C.

SIR: It is understood that your office is prosecuting an appeal from a judgment of the Court of Claims in a case entitled *New York Rayon Importing Co., Inc.*, and others, v. *The United States* involving the determination of the proper party to receive refunds of customs duties allowed by the Customs Court. It is also understood that the judgment includes an allowance of interest on the amount of such refund.

In this connection your office has requested this Bureau for a statement of general practice relative to the payment of interest in cases where the refunds of duties are directed to be made by the United States Customs Court and such refunds are paid pursuant to the court's decisions. It is not and has not been the practice in the Customs Service, when paying refunds of customs duties pursuant to decisions of the United States Cus-

toms Court, to make any payments of interest on the amounts refunded irrespective of the elapsed time between the date of decision and the date of payment.

Very truly yours,

S/ W. R. JOHNSON.
Commissioner of Customs

APPENDIX B

1. Customs Regulations, 1931:

ART. 1191. *Right to receive refund checks.*—A check issued by a collector to a corporation, which has since ceased doing business, as a refund of duties on merchandise imported in its name, will not be paid to another person or firm claiming the proceeds thereof as the real party in interest, unless and until such person or firm has established by competent evidence that they are entitled to the entire amount of the check, or that they have succeeded to the business or assets of the payee corporation. (p. 736.)

2. Customs Regulations, 1937:

ART. 856. *Reliquidation of entries under decisions of the United States Customs Court.*—Entries which are the subject of such decisions will be reliquidated in harmony with the judgment order thereon at the expiration of 60 days from the date of the decision, or 90 days in the case of merchandise imported into Alaska or the insular possessions of the United States, unless an appeal or petition for a rehearing is filed, except that entries the subject of decisions of the court, which follow a decision of the Court of Customs and Patent Appeals involving the same issue, will be reliquidated immediately upon receipt of orders from the United States Customs Court. (p. 489.)

ART. 861. *Refunds of duties.*—(*a*) Refunds of duties on reliquidation by reason

of any ruling or decision of the Bureau, the United States Customs Court or the United States Court of Customs and Patent Appeals will be made in accordance with chapter XXII.

(*b*) The refunding of moneys in compliance with such decisions is the function of the Secretary of the Treasury, and there is no foundation for a suit against the collector of customs to restrain him from disposal of such moneys.

(*c*) Payments of costs and interest in customs cases upon such refunds is not allowed. (p. 490.)

ART. 1190. *Certification.*—(*a*) The Division of Disbursement shall disburse moneys only upon certification of persons by law duly authorized to incur obligations on behalf of the United States. The function of accountability for improper certification shall be transferred to such persons and no disbursing officer shall be accountable therefor. (p. 682.)

* * * * *

ART. 1201. *Refund of excessive duties, etc.*—(*a*) The authorized refunds of amounts deposited into the Treasury covering duties collected in excess of the amount found due upon the liquidation or reliquidation of an entry, fees, charges, or exactions collected erroneously or in excess of the amount actually due, or fines, penalties, or forfeitures collected which did not accrue or accrued in a lesser amount or which have been mitigated to an amount less than collected or which have been remitted, shall be refunded from the appropriation "Refunds and Drawbacks (Customs)". Refunds of duties collected in Puerto Rico

and refund of duties and other receipts collected in the Virgin Islands will be made from the customs receipts of Puerto Rico or the Virgin Islands, as the case may be.

(*b*) Whenever it is found on liquidation or reliquidation of an entry that a refund is due, a notice of refund customs Form 5269, shall be prepared at the headquarters port in the name of the person to whom the refund is due as determined by paragraph (*c*).

(*c*) Refunds of such excessive duties shall be made by check drawn to the order of the importer of record, that is, the person in whose name the entry was made, or to the order of the actual owner when substituted for the importer of record in accordance with section 485 (d) of the tariff act. The person in whose name a rewarehouse entry is made may, for the purpose of making refunds, be considered the importer of record of the merchandise covered by the rewarehouse entry, provided he has filed a rewarehouse bond and the principal in the original warehouse entry bond does not, in advance of payment of the refund, file a written notice of an adverse claim. (See T. D. 45614.) The check covering the amount due, accompanied by the original notice of refund, shall be delivered or mailed together to the person entitled to receive the same, provided that, in the case of entries made at ports of entry other than headquarters ports, the check and notice shall first be sent to the deputy collector in charge at the port of entry for mailing after noting payment on the proper schedule.

(*d*) In case the nominal consignee has become bankrupt, refunds of duties on merchandise entered in the name of such nomi-

nal consignee for the account of the actual owner should be withheld from payment pending the receipt of claim therefor and establishment of rights thereto, unless the declaration of the ultimate consignee or actual owner has been filed with the collector, under the provisions of section 485 of the tariff act.

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